

GLYNN & MALGRAN, P.C.
ATTORNEYS AT LAW

GP 3700

KENNETH P. GLYNN, ESQ.
Bars: New Jersey, Conn., Federal
U.S. Patent & Trademark Office
U.S. Ct. of Appeals for Fed. Circuit

G. RICHARD MALGRAN, ESQ.
Bars: New Jersey, New York,
Federal, U.S. Supreme Ct.

STEVEN R. FINK, ESQ.
Bars: New Jersey, Federal

THERESA A. KENNEDY, ESQ.
Bars: New Jersey, Federal

STEVEN D. FARSIU
Juris Doctorate Candidate

Telephone:
(908) 788-0077

Mailing Address:
Suite 201 (Plaza One)
One Rte. 12 West
Flemington
New Jersey 08822-1731

Telefax:
(908) 788-3999

11 September 1998

THE COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, DC 20231

Sir:

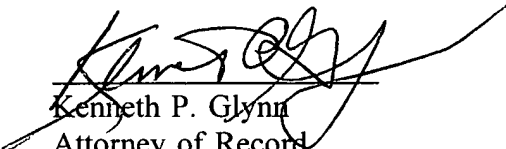
Transmitted herewith for filing is:

Inventor: Harry W. Eberle, III
For: ANCHORING BISCUIT DEVICE FOR JOINING TWO
ADJACENT BOARDS

Attorney Docket No. HWE-103A

Enclosed are:

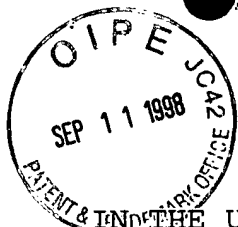
- (X) Appeal Brief (Original plus three copies);
- (X) Check No. 7243 in the amount of \$155.00 to cover the fee for filing an Appeal Brief (was Previously sent); and,
- (X) A certification of mailing by "Express Mail".


Kenneth P. Glynn
Attorney of Record
Reg. No. 26,893

KPG:clp/jhs
Enclosures
cc: Harry W. Eberle, III
Via Express Mail No. EE777070789US

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

#16

In re application of	:	
	:	Examiner:
HARRY W. EBERLE, III	:	
	:	HARRY C. KIM
Serial No.: 08/811,898	:	
	:	Group Art Unit: 3509
Filing Date: March 5, 1997	:	
	:	Attorney Docket No.:
For: ANCHORING BISCUIT DEVICE	:	
FOR JOINING TWO	:	HWE-103A
ADJACENT BOARDS	:	

Honorable Commissioner of Patents and Trademarks
Washington, DC 20231

APPEAL BRIEF

This brief is being filed in response to the Final Rejection of January 20, 1998 in the above-referenced case; and in response to the Notice of Allowability received on August 11, 1998.

I. REAL PARTY IN INTEREST

The inventor of the instant patent application is Harry W. Eberle, III.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences which will directly affect or be directly affected by or have a bearing on a decision in the present Appeal Brief.

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III. STATUS OF CLAIMS

Claims 23 through 27 were submitted by amendment during prosecution and were rejected in the Final Rejection dated January 20, 1998. Claims 23 through 27 were canceled after Final Rejection and new claims 28 through 30 were submitted. However, in the Advisory Action dated March 24, 1998, the Examiner denied entry of proposed claims 28 through 30. Thus, claims 23 through 27 were pending and were the subject of this Appeal as initially filed. However, a substituted Appeal Brief was filed on July 27, 1998 making a minor change in response to the Examiner's PTO-462 dated June 26, 1998. In response to the substituted Appeal Brief filed on July 27, 1998, a Notice of Allowability (Exhibit C) was received dated August 11, 1998 in which claims were allowed. It appeared that the Examiner Lev, whose name is on the Notice of Allowability also allowed some claims that were cancelled by Examiner's Amendment, The August 11, 1998 PTOL 37 indicated that an Examiner's Amendment was attached, but that document was missing. There was also a new PTO-462 included and that is being responded to herein. Of the initially appealed claims 23 through 27, claims 23, 24 and 26 were also allowed (Exhibit B). One week later the undersigned received the same PTO-462 but with a handwritten note, unsigned, unofficial (See Exhibit D) stated in

handwriting to disregard the Notice of Allowability. The undersigned called Examiner Lev and sought an explanation for the handwriiten note and advised Examiner Lev that a Notice of Allowability cannot be withdrawn by a handwritten note and had to be done in accordane with M.P.E.P. Examiner Lev said that he did not write the note and that I could file a petition with the Commissioner. I indicated that I would treat the claims as allowed if he did not follow the M.P.E.P. to withdraw the Notice of Allowability and asked him to reconsider. He informed the undersigned that he would take no action and that the undersigned should procedd as he wished. Thus, officially, claims 23, 24 and 26 were allowed. Claims 25 and 27 are now on appeal.

IV. STATUS OF AMENDMENTS

The amendment submitted on December 5, 1997 was entered with the result that claims 23 through 27 are now pending. The proposed amendment after Final Rejection submitted on March 2, 1998 was not entered. By way of the foresaid Notice of Allowability, claims 23, 24 and 26 are allowed. Claims 25 and 27 are appealed.

V. SUMMARY OF THE INVENTION

The present invention is an anchoring biscuit device for joining three boards. Appendix B contains a

single page showing Figures 1 through 4. Referring specifically to Figures 1, 2 and 3 in Appendix B, there is shown a first substantially flat horizontal top element (3) having a generally biscuit-shaped top view configuration, at least two substantially vertical support members (15 and 17) attached to the underside of the top element and extending downwardly therefrom for a predetermined length to place the top element at a predetermined height for joinder of two adjacent boards which have been pre-cut with biscuit receiving slots. (See also Figure 4 in Appendix B which illustrates the joinder arrangement.) In the present invention device there is also an attachment means established by at least one hole (13) formed at the top element and extending through or between the vertical support members for attachment of the anchoring biscuit device to a support board for anchoring and support of the two adjacent boards by screwing.

VI. ISSUES

The basic issues are as follows:

- (a) The appropriateness of the Examiner's rejection of claims 23 and 24 under 35 U.S.C. §112 as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicant regards as the invention.
- (b) The appropriateness of the Examiner's rejection of claims 23 and 24 under 35 U.S.C. §102(e) as being anticipated by Erwin et al.

- (c) The appropriateness of the Examiner's rejection of claims 23 through 27 under 35 U.S.C. §102(b) as anticipated by Ellinwood.
- (d) The appropriateness of the Examiner's rejection of claims 25 through 27 under 35 U.S.C. §103 as being unpatentable over Erwin et al in view of Bischof.
- (e) The appropriateness of the apparent rejection of claims 25 and 27 on the above grounds view of the allowance of claims 23, 24 and 26.

VII. GROUPING OF CLAIMS

In this appeal, all of the claims are grouped together.

VIII. ARGUMENTS

**ISSUE (A) : THE APPROPRIATENESS OF THE EXAMINER'S
REJECTION OF CLAIM 6 UNDER 35 U.S.C. §112 AS
BEING INDEFINITE FOR FAILING TO PARTICULARLY
POINT OUT AND DISTINCTLY CLAIM THE SUBJECT
MATTER WHICH APPLICANTS REGARD AS THE
INVENTION.**

The Examiner rejected claims 23 and 24 under 35 U.S.C. §112, second paragraph, as "being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention." Office Action, January 20, 1998. The Examiner states that claim 23, lines 13 through 16 state "attachment means established

by... and there are at least two vertical support members attached to said top element" is vague and indefinite since it is unclear whether the said at least two vertical support members are the same as the said at least one vertical support member attached to the underside of the top element (lines 6 through 7), and it is unclear whether the said at least two vertical support members are part of the attachment means. In response, the Applicant concedes to this rejection with respect to the cited wording of claim 23. This would have been obviated if the Examiner had entered the newly submitted claims 28 through 30 after Final Rejection. Applicant would agree to overcome this rejection by appropriate amendment, if permitted by the decision granted in this appeal. However, for purposes of this appeal, please construe claim 23 to be limited to at least two vertical support members as set forth in subparagraph (c) of claim 23.

**ISSUE (B): THE APPROPRIATENESS OF THE EXAMINER'S
REJECTION OF CLAIMS 23 AND 24 UNDER 35 U.S.C.
§102(e) AS BEING ANTICIPATED BY ERWIN ET AL.**

Claims 23 through 27 were submitted by amendment in response to the first Office Action dated November 18, 1997. The earlier pending claims had been rejected under 35 U.S.C.

§102, as unpatentable over Bischof (5,529,428). Based on arguments and amendments submitted on December 5, 1997, this rejection was removed and the Examiner now states that the addition of new claims 23 through 27 submitted on December 5, 1997 necessitated new grounds for rejection and made the Office Action of January 20, 1998 a Final Rejection, even though the amendments merely narrowed the original claims! In fact, however, it is believed that the arguments submitted on December 5, 1997 overcame the Bischof rejection and that this latest rejection should not have been made final.

Nonetheless, in the Office Action of January 20, 1998, in which the rejection was made Final, the Examiner made three new rejections, including this issue (b) art rejection with claims 23 and 24 now being rejected under 35 U.S.C. §102(e) based on Erwin et al.

Erwin et al is directed to a foam-filled extruded decking attachment system which utilized a hold down block (90, Figure 1). Erwin et al is not directed to biscuit-shaped elements, nowhere suggests or renders obvious the use of biscuit elements and, in fact, teaches away from biscuits by using a "block". Biscuits are clearly defined in the carpentry and construction art and differ from splines and blocks by their inherent arcuated shape. Erwin et al requires a block having the same type configuration as the

extruded plastic planks. Because they are continuously extruded (column 3, line 55; column 4, line 17, and elsewhere), their cross-section cannot vary and cannot have biscuit cuts to receive biscuit shaped ties. The present invention is, on the other hand, used with planks having biscuit cuts, e.g. in lumber, formed by a biscuit cutter. Thus, not only does Erwin et al fail to teach biscuits, as required in a proper 35 U.S.C. §102 rejection, but Erwin et al could not be relied upon to even suggest the obviousness of biscuit-shaped ties under 35 U.S.C. §103 because it would be contrary to the teachings and purpose of the extruded planks and matching blocks set forth therein. In fact, biscuits in Erwin et al's system would cut down on surface area contact, would be weaker and would not be obvious to one of ordinary skill in the art, or even be practical in a continuous extruded flat engaging grooves as in Erwin et al. Additionally, Erwin et al uses different physical structures in a different manner from the present invention to achieve different results. Erwin et al is neither anticipatory nor obvious over the present invention.

Hence, this rejection on Erwin et al under 35 U.S.C. §102 as stated, or even under 35 U.S.C. §103, is inappropriate and should be reversed.

**ISSUE (C): THE APPROPRIATENESS OF THE EXAMINER'S
 REJECTION OF CLAIMS 23 THROUGH 27 UNDER 35
 U.S.C. §102(b) AS ANTICIPATED BY ELLINWOOD.**

Ellinwood teaches the use of T-like continuous splines for joinder of abutted panels to rafters or studs. These splines usually run the full length of the studs and even when they do not, Ellinwood states that an important feature is the dimensional relation of this connecting member to the grooves in which it is fitted (column 1, line 46 et seq.), that the connecting member (the spline) has a shape corresponding to the grooves and space of the panels (column 1, line 49 et seq.). These grooves are continuous and flat (see e.g. the Figures of Ellinwood) and that the connecting member be snugly received by the respective groove. None of this teaches or suggests the use of biscuits or biscuit-shaped connection members, but rather, again as with Erwin et al, has specific needs and objectives which teach away from biscuit (arcuate) shapes. It is difficult to even understand the Examiner's interpretation of this reference's teachings in a manner that would render it anticipatory of the present invention. Like Erwin, it describes an invention which is structurally different, mates with a different female aspect and is used for a different purpose.

Thus, the rejection, under 35 U.S.C. §102 or even an obviousness rejection under 35 U.S.C. §103, would be inappropriate and the rejection should be reversed.

ISSUE (D) : THE APPROPRIATENESS OF THE EXAMINER'S
 REJECTION OF CLAIMS 25 THROUGH 27 UNDER 35
 U.S.C. §103 AS BEING UNPATENTABLE OVER ERWIN
 ET AL IN VIEW OF BISCHOF.

Erwin et al is discussed in detail above under Issue B, and its significant shortcomings are stated. These shortcomings stated in Issue B and all of the arguments are incorporated herein by reference. The Bischof secondary reference does not overcome the Erwin et al deficiencies.

Bischof is directed to a metallic structural element for connecting work pieces consisting of wood, woodworking material or plastic which includes a lamellar part and a bolt-like part. The lamellar part provides a non-positive connection with a first workpiece provided with a groove and a transverse hole. The bolt-like part, through screwing or pinning, attaches the non-positive connection with the second workpiece via a longitudinal hole. In other words, the Bischof connector is a half biscuit with a planar extended screw and a traverse locking hole. Bischof does not even provide for a horizontal top element and vertical support members to create the flat top (horizontal) and the downwardly extending at right angles (vertical) support members. In fact, the Bischof device is all in a single flat plane! Thus, it is completely different from the present invention and teaches totally away from the present invention. The Examiner relies upon Bischof to reject the

claims under 35 U.S.C. §103 in conjunction with Erwin et al on the basis that it would be obvious to change Erwin's device to be arcuated to reduce friction. However, this is contrary to the teachings of the main reference and is inferior and structurally different from the present invention device as claimed.

Finally, to correct a misunderstanding of Bischof, referring to Figure 9 of Bischof, it is true that one end plate of the device shown is arc-shaped on both sides and thus biscuit-shaped. But this is merely a drilling template in Figure 9 and cannot be used as an anchoring device as in the fashion of the present invention and is still significantly structurally and functionally different. For example, stop part 25 is a solid section running the entire length of the end plate and a screw could not pass through cut-out 28 to fasten the device to anything. Stop 25 (the "vertical support member") must be solid under hole 28 to present the center mark 29. Thus, Figure 9 of Bischof shows a device which is structurally different from the present invention, serves a different purpose and achieves a different result. Even a 35 U.S.C. §103 rejection would be inappropriate because it would not be obvious to modify a cutting and drilling template into a joiner device, especially since Bischof already teaches a joiner device which is established in a single flat plane and is totally different from the present invention.

It is important to note that both the primary reference to Erwin et al and the secondary reference to Bischof show complete matching of the insertable tie and the receiving board. It is recognized throughout the art (see, e.g., Ellinwood which talks of "snug" fitting of the groove and connecting element) that boards stay fitted when connectors and receivers are male-female matching. The hindsight argument to put a biscuit into a flat groove is nowhere taught or suggested in either reference and is not obvious.

Additionally, even the idea of combining Erwin et al's teachings with Bischof's teachings is inappropriate because Erwin et al is anchoring extruded planks with necessarily flat grooves which cannot be extruded as female biscuit (arcuate) slots, and Bischof is using a half biscuit for end-to-end wood construction. While they have the similar areas of classification, they are technically not analogous. One of ordinary skill in the art of extruded planking would not look to biscuit or half-biscuit technology for joining extruded planks because it is impossible to extrude arcuated cut-outs and surface to surface (snug) fitting is desired.

Thus, this rejection should be reversed.

ISSUE (E): **THE APPROPRIATENESS OF THE APPARENT REJECTION
OF CLAIMS 25 AND 27 ON THE ABOVE GROUNDS IN
VIEW OF THE ALLOWANCE OF CLAIMS 23, 24 AND
26.**

Claims 23, 24 and 26 have been allowed by the Notice of Allowability of August 11, 1998. Claims 25 and 27 which are more limiting than the allowed. Additionally, all of the arguments set forth under Issues (A), (B), (C), and (D) above are incorporated herein in further support of rejected claims 25 and 27.

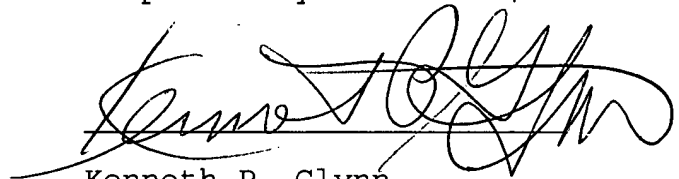
CONCLUSION

Applicants believe it should be clear to the Board of Appeals that currently pending claims 23 through 27 are substantively allowable over the prior art relied upon by the Examiner and that the 35 U.S.C. §112 rejection can be overcome by simple amendment. On the alternative, claims 25 and 27 the only claims officially remaining under rejection, should be allowed for the same reasons. The rejections under 35 U.S.C. §102 and 35 U.S.C. §103 should be reversed. The appealed claims are attached hereto as Exhibit A. The allowed claims 23, 24 and 26 are attached hereto as Exhibit B.

Thank you.

Respectfully submitted,

Date: September 11, 1998



Kenneth P. Glynn
Reg. No. 26,893
Attorney for Applicants
Suite 201 (Plaza One)
One Route 12 West
Flemington, NJ 08822
(908) 788-0077 Tele
(908) 788-3999 Fax

Via Express Mail No.: EE777070789US
cc: Harry W. Eberle, III



APPENDIX A

23. An anchoring biscuit device for joining three boards, which comprises:

(a) a first substantially flat horizontal top element having a generally biscuit-shaped top view configuration, said top element having an imaginary center line;

(b) at least one substantially vertical support member attached to the underside of said top element along said imaginary center line of said top element and extending downwardly therefrom for a predetermined length to place said top element at a predetermined height for joinder of two adjacent boards which have been pre-cut with biscuit receiving slots; and,

(c) attachment means established by at least one screw hole located substantially in the center of said top element and there are at least two vertical support members attached to said top element, said two vertical support members being substantially flat, being in the same plane and at least one of each vertical support members being located on opposite sides of said at least one screw hole so as to permit insertion of a screw through said top element and between said at least two vertical support members.

24. The anchoring biscuit device of Claim 23 wherein said top element and said vertical support members are unitarily formed.

26. The anchoring biscuit device of claim 25 wherein there is at least one screw hole located substantially in the center of said top element and there are two vertical support members attached to said top element, said two vertical support members being substantially flat, being in the same plane and one of each being located at least on opposite sides of said at least one screw hole.



APPENDIX B

25. An anchoring biscuit device for joining three boards, which comprises:

(a) a first substantially flat horizontal top element having a generally biscuit-shaped top view configuration, said top element having an imaginary center line and having symmetrical, opposite sidewalls in the shape of a circular arc of predetermined radius and length and having opposite, flat endwalls;

(b) at least one substantially vertical support member attached to the underside of said top element along said imaginary center line of said top element and extending downwardly therefrom for a predetermined length to place said top element at a predetermined height for joinder of two adjacent boards which have been pre-cut with biscuit receiving slots of similar configuration to said top element sidewalls; and,

(c) attachment means established by at least one screw hole formed at said top element and extending through said vertical support member for attachment of said anchoring biscuit device to a support board for anchoring and support of said two adjacent boards by vertical screwing.

27. The anchoring biscuit device of claim 25 wherein said top element and said vertical support member are

unistructurally formed.



APPENDIX C



ONE ROUTE 12 W
FLEMINGTON NJ 08822-1731

3623

DATE MAILED:

08/11/98

This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS

NOTICE OF ALLOWABILITY

All claims being allowable, PROSECUTION ON THE MERITS IS (OR REMAINS) CLOSED in this application. If not included herewith (or previously mailed), a Notice of Allowance and Issue Fee Due or other appropriate communication will be mailed in due course.

- ☒ This communication is responsive to amendment filed 7-27-98
- ☒ The allowed claim(s) is/are 18, 21, 23, 24, 26, 28-32, 35, 36
- ☐ The drawings filed on _____ are acceptable.
- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
- ☐ All ☐ Some* ☐ None of the CERTIFIED copies of the priority documents have been
- ☐ received.
- ☐ received in Application No. (Series Code/Serial Number) _____
- ☐ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

*Certified copies not received: _____

- ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

A SHORTENED STATUTORY PERIOD FOR RESPONSE to comply with the requirements noted below is set to EXPIRE **THREE MONTHS** FROM THE "DATE MAILED" of this Office action. Failure to timely comply will result in ABANDONMENT of this application. Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

- ☐ Note the attached EXAMINER'S AMENDMENT or NOTICE OF INFORMAL APPLICATION, PTO-152, which discloses that the oath or declaration is deficient. A SUBSTITUTE OATH OR DECLARATION IS REQUIRED.
- ☐ Applicant MUST submit NEW FORMAL DRAWINGS
- ☐ because the originally filed drawings were declared by applicant to be informal.
- ☐ including changes required by the Notice of Draftperson's Patent Drawing Review, PTO-948, attached hereto or to Paper No. _____
- ☐ including changes required by the proposed drawing correction filed on _____, which has been approved by the examiner.
- ☐ including changes required by the attached Examiner's Amendment/Comment.

Identifying indicia such as the application number (see 37 CFR 1.84(c)) should be written on the reverse side of the drawings. The drawings should be filed as a separate paper with a transmittal letter addressed to the Official Draftperson.

- ☐ Note the attached Examiner's comment regarding REQUIREMENT FOR THE DEPOSIT OF BIOLOGICAL MATERIAL.

Any response to this letter should include, in the upper right hand corner, the APPLICATION NUMBER (SERIES CODE/SERIAL NUMBER). If applicant has received a Notice of Allowance and Issue Fee Due, the ISSUE BATCH NUMBER and DATE of the NOTICE OF ALLOWANCE should also be included.

Attachment(s)

- ☐ Notice of References Cited, PTO-892
- ☐ Information Disclosure Statement(s), PTO-1449, Paper No(s). _____
- ☐ Notice of Draftperson's Patent Drawing Review, PTO-948
- ☐ Notice of Informal Patent Application, PTO-152
- ☐ Interview Summary, PTO-413
- ☒ Examiner's Amendment/Comment
- ☐ Examiner's Comment Regarding Requirement for Deposit of Biological Material
- ☐ Examiner's Statement of Reasons for Allowance

**Notification of Non-Compliance with
37 CFR 1.192(c)**

Application No.
08/811,898

Applicant(s)

Eberle

Examiner

Bruce A. Lev

Group Art Unit
3623



SEP 11 1998

The Appeal Brief filed on Jul 31, 1998 is defective for failure to comply with one or more provisions of 37 CFR 1.192(c). See MPEP § 1206.

Applicant is given a TIME LIMIT of ONE MONTH from the date of this letter or any time remaining in the period under 37 CFR 1.192(a) for filing a new complete brief. If a new brief that fully complies with 37 CFR 1.192(c) is not timely submitted, the appeal will be dismissed. The new complete brief must be filed IN TRIPLICATE. See 37 CFR 1.192(a).

1. ☐ The brief does not contain the items required under 37 CFR 1.192(c), or the items are not under the proper heading or in the proper order.
2. ☐ The brief does not contain a statement of the status of all claims, pending or cancelled, or does not identify the appealed claims (37 CFR 1.192(c)(3)).
3. ☐ At least one amendment has been filed subsequent to the final rejection, and the brief does not contain a statement of the status of each such amendment (37 CFR 1.192(c)(4)).
4. ☐ The brief does not contain a concise explanation of the claimed invention, referring to the specification by page and line number and to the drawing, if any, by reference characters (37 CFR 1.192(c)(5)).
5. ☐ The brief does not contain a concise statement of the issues presented for review (37 CFR 1.192(c)(6)).
6. ☒ A single ground of rejection has been applied to two or more claims in this application, and
 - a. ☒ the brief omits the statement required by 37 CFR 1.192(c)(7) that one or more claims do not stand or fall together, yet presents arguments in support thereof in the argument section of the brief.
 - b. ☐ the brief includes the statement required by 37 CFR 1.192(c)(7) that one or more claims do not stand or fall together, yet does not present arguments in support thereof in the argument section of the brief.
7. ☐ The brief does not present an argument under a separate heading for each issue on appeal (37 CFR 1.192(c)(8)).
8. ☐ The brief does not contain a correct copy of the appealed claims as an appendix thereto (37 CFR 1.192(c)(9)).
9. ☒ Other (including any explanation in support of the above items):

The brief states that claims 23-27 "may" be grouped together, which does not specifically state that claims 23-27 "are" grouped together. This question is exemplified within the presented arguments pertaining to the rejection of claims 25-27, issue D, wherein the issue of the patentability of claims 25-27 is argued separately from the issue of the patentability of claims 23-27 as argued in issue C.

Daniel P. Stodola
Supervisory Patent Examiner
Group 3600



APPENDIX D

Serial # 08/811,898
Disregard Notice
of Allowability mailed
8-11-98. This is the
correct form
attached PTO 462
Notice of Non-
Compliance with
37 CFR 1.192(c)



CERTIFICATION OF MAILING BY EXPRESS MAIL

The undersigned hereby certifies that this document was delivered to the United States Post Office in Flemington, New Jersey 08822 between 7:30 a.m. and 4:45 p.m. on Friday, September 11, 1998 as EXPRESS MAIL. The undersigned further declares that this Certification is made with the knowledge that willful false statements are punishable by fine or imprisonment, or both, under applicable sections of United States law and that willful false statements made before the United States Patent and Trademark Office may jeopardize the validity of the application or issuing patent related thereto.


Jessica H. Shiroff

Express Mail No. EE777070789US

(Docket No. HWE-103A)